PGM (Suing as a legal representative of the estate of KMG - Deceased) v Kimathi (Civil Appeal 98 of 2017) [2022] KECA 76 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 76 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 98 OF 2017

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

PGM (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF KMG - DECEASED) ..... APPELLANT

AND

LAZARUS MUMO KIMATHI (ON BEHALF OF THE ESTATE OF ERASTUS MUTHAMIA KIARA (DECEASED) ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (A. Ong'injo, J.) dated 4th May, 2017 in HC.C.A. No. 50 of 2012)

JUDGMENT

1. This is a second appeal arising from the judgment in the High Court of Kenya at Meru (A. Ong'injo, J) dated 4th May, 2017 in Civil Appeal No. 50 of 2012.

2. The background to the appeal is that the appellant, PGM (suing as a legal representative of the estate of KMG (deceased) filed a plaint dated 15th June 2010 in the Senior Resident Magistrate's Court at Chuka being Civil Case No. 28 of 2010 against one, Lazarus Mumo Kimathi, who is now deceased, and who is represented in these proceedings by Erastus Muthamia Kiara.

3. In the plaint, the appellant's averments were inter alia that at all material times relevant to the suit, the respondent was the registered owner of motor vehicle Reg. No. KBB 663L canter; that on 3rd June 2009, KMG, a minor, was walking along Kathua-Mungoni road when the respondent by himself, his driver and or employee so negligently drove, and/or managed motor vehicle Reg. No. KBB 663L along the said road that it ran over the said child thus occasioning his fatal injuries; that the accident was as a result of the respondent's negligence particularized in the plaint, and for which the respondent was vicariously liable.

4. The appellant averred further that as at the time of his demise, the deceased was aged seven (7) years, but with dependants listed in the plaint as PGM – father, EIG – mother and EMG – brother. By reason of the factors aforesaid, the appellant sought against the respondent special damages as quantified in the plaint, general damages both under the *Law Reform Act* and *Fatal Accidents Act*, as well as costs and interest.

5. The respondent was served, entered appearance and filed a defence dated 14th October 2010 denying the appellant's claim in toto and put him to strict proof. Without prejudice to the foregoing, the respondent averred inter alia that if any accident occurred on the date specified by the appellant, but which was denied, then the same was wholly or substantially contributed to by the negligence of the deceased minor and gave particulars of negligence attributed to the minor and prayed for the appellant's suit to be dismissed with costs to him.

6. The cause before the trial court was canvassed through rival pleadings, evidence tendered by the respective parties and their witnesses at the conclusion of which parties filed written submissions. The trial magistrate P. Ngare, SPM evaluated the record in totality and rendered himself thereon inter alia as follows:

> "I have carefully considered the evidence on record together with the exhibits produced. I have also studied the submissions. On the fateful evening, DW1 was dropping Christine Kimathi at her residence in Kibumbu area. On getting to Kathua-Mungoni road it would appear that the road is narrow and there is doubt as to whether PW2 and his friends boarded the vehicle herein but what is for sure is that the deceased never boarded the same. He appeared to have ran after the vehicle and then on its return journey he also never boarded it.
>
> Considering the time which was in the night, it was highly unlikely that DW1 would have known that the deceased was running after the vehicle. It is my considered and humble opinion that the deceased was on a frolic of his own. There was no eye witness and this court cannot know how he succumbed to the injuries. The authorities cited are very clear that in the absence of an eye witness, it is difficult to attribute any negligence or liability.
>
> ....."

7. Turning to the general damages as quantified by the appellant, the trial magistrate disallowed the appellant's claim for an award of Kshs.549,200/= as damages, because, according to him, the child had no dependants considering his age and state of maturity. The plea for kshs.400,000/= as loss of dependency could not therefore stand and was accordingly dismissed. The trial magistrate was however of the opinion that had the appellant succeeded in his claim against the respondent, the trial magistrate would have awarded kshs.100,000/= for loss of expectation of life and special damages of kshs.29,200/=. On the basis of the above assessment and reasoning, the appellant claim was dismissed in its entirety.

8. The appellant was aggrieved and filed an appeal at the High Court of Kenya at Meru being Civil Appeal No. 50 of 2012. Patrick Gitari Mberia vs. Lazarus Mumo Kimathi raising various grounds of appeal. The learned Judge, A. Ong'injo, J. reevaluated the record in light of the rival submissions filed by the respective parties in support of their rival positions and in a brief judgment, the Judge rendered herself as follows:

> "I have perused the evidence on record of the plaintiff and defendant in Chuka SRMCC No. 38 of 2010 and giving consideration that I did not have advantage of seeing or listening to the witnesses physically, find no reason to interfere with the findings of the Honourable Magistrate for reasons that the appellant failed to file submissions in support of that appeal

and, secondly, for reasons that even the plaintiff's witnesses particularly PW3 did not fault the driver, DW1 with causation of the accident. She did not see the deceased aboard lorry's trail guards and she said DW1 told her to tell the children on trail guard of his lorry to stop climbing on the lorry.

It was at dusk, and it was not understandable by the plaintiff or the defence how the deceased minor got into contact with the lorry to suffer the fatal injuries.

It is unfortunate that such young life was cut short but it is obvious that the driver did not do anything that could be said to have been negligent conduct to make this court overturn the findings of the lower court. The appeal is therefore dismissed. However, each party will bear their own costs."

9. The appellant was aggrieved and is now before this Court on a second appeal raising six grounds of appeal. It is the appellant's complaint that the learned Judge: utterly abdicated her duty as the first appellate court Judge of analyzing the evidence afresh wholly and impartially; failed to apply the law as known by concurring with the trial magistrate on the evidence of P.C Okoth and, therefore, erred in law as it is the duty of a court to determine/apportion negligence/liability and not the investigating officers; failed to analyze the submissions both in the lower court and the superior court; failed to address the issue of res ipso loquitor as pleaded by the appellant; failed to note the glaring and material contradictions in the evidence tendered by the driver (DW1); the judgment by the learned Judge amounts to a miscarriage of justice and is self-defeatist; and, lastly, that the learned Judge in her evaluation of the evidence tendered by the appellant failed to accord it the necessary weight thereby arriving at a judgment that is wholly unsustainable both in law and in fact.

10. The appeal was canvassed via Go-To-Meeting platform through written submissions in the presence of learned counsel Mr. Mokua Obiria in attendance for the appellant while learned counsel Mr. Muia Mwanzia appeared for the respondent, both of whom fully adopted their written submissions in support of their rival positions herein without orally highlighting them.

11. Addressing all the grounds of appeal raised cumulatively, the appellant submits that: the first appellate court abdicated its role of reevaluating the evidence afresh and arrive at its own independent conclusion thereon; and if it did then the Judge misapprehended the facts and as a result arrived at a decision that is untenable in light of the overwhelming evidence tendered on the record in support of the appellant's case.

12. In support of the above position, the appellant relies on the record at pages 117 – 118 thereof and faults the Judge for faulting the appellant's appeal to the High Court for alleged appellant's failure to file written submissions which in fact had been filed on 15th April, 2016 and duly stamped by the court. It is also the appellant's position that, even if the appellant had failed to file submissions of which he asserts had been filed as at the time the Judge assessed the record, the Judge was bound to reevaluate the record as laid before her and arrive at her own independent conclusions on the matter.

13. The Judge is also faulted for relying on the evidence of PW3 as the basis for disallowing his appeal. In his opinion, PW3's failure to attribute any blame on DW1, the driver of the respondent for the causation of the fatal injury that resulted in the death of the deceased was no basis for not finding in favour of the appellant on his claim as according to the appellant, civil matters are determined on a balance of probabilities. It is also the appellant's position that evidence abound as to how and what caused the death of the deceased minor which he alleged both courts below failed to address. He relies on the decision in the case of *Esther Nkudate vs. Touring & Sporting Cars Ltd & Another [1979] eKLR* on the threshold forattributing negligence on the part of a child of tender age.

14. The appellant appreciates that the Judge correctly appreciated that it was dusk when the accident occurred and that the accident occurred on a road that was teeming with children which, according to the appellant, was sufficient for the two courts below to attribute blame on the driver of the respondent for failure to be cautious of the presence of the teeming children and, therefore, drive with caution; that the fact of the accident having occurred in the manner described by the witnesses called by the appellant, it was sufficient basis for attributing negligence to the driver.

15. The appellant also took issue with the erroneous finding by the two courts below that there were no eye witnesses while there were statements of eye witnesses displayed on the record at pages 15 and 17.

16. On the totality of the above submissions, the appellant has urged this court to set aside the concurrent decisions by the two courts below denying him relief and substitute therefor an order allowing his claim together with an attendant appropriate award for general damages and costs.

17. In rebuttal, the respondent relying on written submissions filed both currently and at the first appellate court stage and authorities relied upon then submits that grounds 1 and 6 of the appeal are without merit as the record is explicit that the learned Judge analyzed the record as a first appellate court Judge and arrived at an independent conclusion. It is therefore not correct as contended by the appellant that the Judge abdicated her duty as a first appellate court Judge by allegedly failing to reevaluate the record on her own and arrive at an independent decision.

18. On ground 2, the respondent submits that it was neither the trial court's nor the appellate court's duty to prosecute the appellant's case both at the trial and on appeal. It was incumbent upon the appellant to prosecute his case by adducing evidence to establish the particulars of negligence attributed to the respondent. It is the respondent's position that the record is explicit that the two courts below found no negligence attributable to the respondent through the evidence of P. C. Okoth. The two courts below cannot therefore be blamed for this failure as it was the business of the appellant in his capacity as the plaintiff to adduce evidence in support of his claim.

19. On ground 3, the respondent submits that indeed the appellant pleaded the doctrine of res ipsa loquitur but does not agree that it was never addressed by the two courts below. It is his position that the two courts below addressed the applicability of the above doctrine and ruled out its application to the circumstances prevailing herein for lack of eye witnesses evidence to support it.

20. On grounds 4 and 5, the respondent submits that there are no inconsistencies in the evidence adduced by DW1. Nor are there any material contradictions in that evidence. It is the respondent's assertions that the evidence of the respondent was clear and no negligence can be attributed to his driver. It is also the respondent's assertion that the burden of proof lay on the appellant to prove his case both at the trial and on first appeal which he failed to do, a position properly appreciated by the two courts below. The impugned judgment is therefore sound and should be sustained and, on that account, the court to dismiss the appeal.

21. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina vs. Mugiria [1983] KLR 78*, *Kenya Breweries Ltd vs. Godfrey Odongo, Civil Appeal No. 127 of 2007*, and *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR*, for the holdingsinter alia that on a second appeal, the Court confines itself to matters of law only, unless it is demonstrated sufficiently that the Court(s) below considered matters they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse.

22. We have considered the record in light of the above mandate of the court. In our view, the issues that fall for our consideration are whether the first appellate court:

1) Abdicated its role as a first appellate court by failing to reevaluate the record as a whole and arrive at its own independent decision on the matter.

2) Misapprehended the evidence in support of the appellant's claim.

3) Failed to address and express itself on the doctrine of res ipsa loquitor.

4) Failed to address contradictions and inconsistencies in the respondent's case.

23. On the first issue, both the predecessor of this court and the court itself in a long line of authorities have delineated the role of a first appellate court. We take it from *Selle vs. Associated Motor Boat Co. [1968] E.A 123* in which the predecessor ofthis court expressed itself thereon inter alia as follows:

> " ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

See also *Jabane vs. Olenja [1986] KLR 664 at p. 664*, in which Hancox J.A. added as follows:

> " I accept this proposition, so far as it goes, and this court does have power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see (*Peters vs. Sunday Post* [1958] E.A. 424). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus Mwangi vs. Duncan Mwangi Wambugu* (1982-88) 1 KAR, 278 and *Mwana Sokoni vs. Kenya Bus Service* (1982-88)1 KAR 870."

24. We have revisited the impugned judgment. The record is explicit that the Judge summarized the evidence tendered by the witnesses called by the respective parties herein, made observations on the conclusion reached by the trial court thereon and then expressed herself thereon as already set out above. We find nothing on our own to suggest that the Judge abdicated her role as a first appellate court Judge especially when the particular instances evidencing such abdication of the first appellate court's mandate have not been specifically spelt out in the submissions. We, therefore, rule that the approach taken by the first appellate court Judge in addressing the issues on first appeal accord with the crystallized position in law for the exercise of that mandate as already highlighted above in the case law we have cited above for this purpose.

25. On the second issue, the appellant's claim at the trial was anchored on the tort of negligence as more particularly set out in paragraph 5 of the plaint. We have revisited the same. It is our position that in order to succeed, the appellant was obligated in law to prove the elements/ingredients of negligence relied upon in support of his claim namely proof that the accident vehicle was driven carelessly/ negligently, the accident driver failed to give a proper regard/look out for other road users, failed to apply brakes, and that he drove in an excessive speed.

26. The threshold the appellant was obligated to meet in proof of the above elements/ingredients of negligence is as explicitly set out in sections 107, 108, 109, 110 and 112 of the *Evidence Act*, which we find prudent not to set them out in extenso. It is sufficient for us to simply state that it is now trite that he who alleges has the burden to prove and since this was a matter touching on civil litigation, the burden of proof was on a balance of probabilities. The record is explicit that indeed the appellant adduced evidence through PGM, PW1, Gilbert Githinji, PW2, and Magdalene Karendi, PW3. We

have revisited the record with regard to the evidence adduced by the above witnesses not to reevaluate it on our own afresh but simply for us to appreciate the same and determine whether the same was misapprehended by the Judge as claimed by the appellant on his appeal to this Court.

27. Our take on the evidence as adduced at the trial is that PW1 was not at the scene. PW2 boarded the vehicle. He was categorical both in his evidence in chief and cross examination that the deceased never boarded the vehicle but he (PW2) saw him run after the vehicle on the first trip. He managed to reach where the vehicle had stopped. On its return, he did not also board the vehicle but allegedly ran ahead of it. When PW2 and his colleagues alighted from the vehicle they did not see the deceased. Neither did they witness the vehicle hit the deceased. PW2 does not say that the driver stopped the vehicle for them to alight at the spot where they had boarded it in the first instance, which creates a rebuttable inference that the boys may have boarded the vehicle both ways on their own without the knowledge of the driver.

28. PW3 did not also witness the accident. It was her testimony that as she walked on the road, she found the deceased bleeding from the forehead being assisted by his brother. PW5 was the investigating officer. He gave evidence touching on the findings on investigations. He was categorical that the respondent's driver was absolved of negligence because he was not aware of the presence of the children getting on and off the vehicle he was driving on his journey to and from his employer's home where he had gone to drop the employer's wife.

29. Our take on the above evidence is that the two courts below cannot be faulted on the impression formed thereon that there was no eye witness who could state categorically how the deceased met his death so as to pin responsibility on the respondent for the causation of the said accident on account of either one or more of the elements/ingredients of negligence relied upon by the appellant in support of his claim against the respondent as had been pleaded in the plaint.

30. The above conclusion now leads us to interrogate the application of the doctrine of res ipsa loquitur. It is our position that indeed, this doctrine was pleaded by the appellant at paragraph (vi) of the plaint. It reads:

> " So far as may be applicable the plaintiff shall rely on the doctrine of res ipsa loquitur."

31. The *Black's Law Dictionary, 9th edition, page 1424* explains the doctrine of res ipsa loquitor ("the thing speaks for itself"), inter alia, as follows:

> " The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes.'
>
> 'it is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or omission. When the fact of control is used to justify the inference that defendant's negligence was responsible it must of course be shown that the thing in his

control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

"Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence.Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type of category of accidents involved."

32. In *Nandwa vs. Kenya Kazi Limited [1988] eKLR*, the Court of Appeal cited a portion of the Judgment in the English case of B*arkway vs. South Wales Transport Company Limited [1956] 1 ALLER 392 at Page 393 B* on the nature andapplication of the doctrine of res ipsa loquitur as follows:-

> " The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

The Court of Appeal in *Embu Public Road Services Ltd vs. Riimi [196] EA 22* held that:

> " where an accident occurs and no explanation is given by the defendants which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitor and hold the defendant liable in negligence."

In *Margaret Waithera Maina vs. Michael K. Kimaru [2017] eKLR* this Court invoked the doctrine of Res ipsa loquitur as follows:

> " This is a case where the doctrine of Res Ipsa Loquitor applies. In *Mukusa vs. Singa & Others* (1969) E. A 442, it was held that for the doctrine to apply there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care".
>
> ....."

33. See also the discussion of the application of the above doctrine in the persuasive High Court case of *Susan Kanini Mwangangi & another vs. Patrick Mbithi Kavita [2019] eKLR* in which the predecessor of this Court's decision in *Embu Public Road Services Ltd. v Riimi [1968] EA 22* was cited with approval with regard tothe following exposition:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that

an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."

34. Lastly, in *Ali Salim Karama vs. African Line Transport Co. Ltd* Mombasa Civil Case No. 187 of 2006, the court expressed itself thereon as follows:

> " On the applicability of the doctrine of *res ipsa loquitur* in the case of *Mary Ayo Wanyama & 2 Others (suing as personal representative of the estate of Pontianus Ngondwa Mukoya vs. Nairobi City Council* Nairobi CA No. 252 of 1998, this Court made observation that "there was doubt as to whether res ipsa loquitur could be described as a doctrine," but the court was clear in its mind that the phrase or maxim simply means that:-
>
> > "It is a rule of evidence whose essence is that an event which in the ordinary course of things is more likely than not to negligence. In other words, whether the expression res ipsa loquitur is applicable or not depends upon whether in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence."

35. Our take on the totality of the above assessment which we have deliberately set out in extenso on the application or otherwise of the above doctrine is that there must be facts from which an inference can be drawn that in the absence of any explanation, the causation of the accident subject of the inquiry in the litigation was due to the negligence of the defendant. Herein there is no evidence demonstrating how the deceased came into contact with the respondent's motor vehicle. If at all there was such contact. There is, therefore, no facts on the basis of which an inference could then and can now be drawn to pin responsibility on the respondent for the causation of the deceased's death.

36. Turning to the alleged existence of inconsistencies and contradictions in the defence evidence allegedly not addressed by the two courts below, the position in law, as we know, it is that where these allegedly exist they have to be pointed out. It is only after they have been pointed out that the court has a duty to reconcile them and determine their overall impact on the resolution of the issues in controversy as between the respective parties to the proceedings. Herein, none were singled out and brought to the attention of the two courts below to address themselves thereon. Neither have any been pointed out to us. All we have on record is a general complaint which, in our view, is not sufficient.

37. The upshot of the totality of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed. Due to the peculiar circumstances giving rise to the litigation, we order each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR